STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER D. BENTFIELD,

Plaintiff-Appellant,

v

BRANDON'S LANDING BOAT BAR, DAVID WATTS, INC., and DAVID WATTS,

Defendant-Appellees.

UNPUBLISHED
August 31, 2004

No. 248795
Oakland Circuit Court
LC No. 02-039613-NO

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendants' motion for summary disposition, pursuant to MCR 2.116(C)(10), in this slip-and-fall negligence case. We affirm in part, reverse in part, and remand.

I

Plaintiff lived in the upstairs portion of Brandon's Landing Boat Bar. In January 2000, plaintiff left the premises to go shopping. Upon returning, plaintiff claims that he slipped and fell on an accumulation of ice and suffered a physical injury.

Plaintiff filed a complaint on April 1, 2002, alleging that "on or about January 18, 2000, [p]laintiff was lawfully upon [d]efendants' premises as a business invitee and tenant, when he slipped on an unreasonably dangerous accumulation of ice and/or snow, fell down, and suffered physical injury." Plaintiff contended that defendants failed to inspect and maintain the premises in question. On December 18, 2002, defendants, in a motion for summary disposition, contended that the condition encountered was open and obvious and that there was no evidence that defendants had notice. The trial court granted defendants' motion for summary disposition because there was no genuine issue of material fact with regard to whether the danger posed by the snow and ice was open and obvious, and that there were no special aspects. Plaintiff, then, moved for reconsideration arguing that defendants motion should have been denied because plaintiff was owed a statutory duty under MCL 554.139 to keep the premises in reasonable repair. Plaintiff further contended that that open and obvious doctrine cannot be used as defense with respect to a violation of MCL 554.139. In response, defendants' contended that plaintiff's argument with regard to MCL 554.139 was untimely. The trial court denied the motion, stating

that plaintiff "merely present[s] the same issues as ruled upon previously by this Court either expressly or by reasonable implication."

II

Plaintiff contends that the trial court erred in granting summary disposition because the danger posed by the ice covered by snow was not in fact open and obvious and that if it was, special aspects existed, which removed it from the open and obvious doctrine. We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(10), summary disposition is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); *J & J Farmer Leasing, Inc v Citizens Ins Co*, 260 Mich App 607, 612; 680 NW2d 423 (2004).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Defendants do not dispute that plaintiff, as a tenant, was an invitee. An invitor owes a duty to his invitees to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). An invitor's liability must arise from active negligence, through an unreasonable act or omission, or through a condition of which the invitor knew or a condition of such a character or duration that the invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). This duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 500; 418 NW2d 381 (1988); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 195; 600 NW2d 129 (1999). An invitor must warn of hidden defects, but is not required to eliminate or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Lugo, supra*; *Riddle v McLouth Steel Products*, 440 Mich 85, 90-96; 485 NW2d 676 (1992). Basically, the "open and obvious doctrine," attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Lugo, supra* at 516. "The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000) quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

In the present case, plaintiff argues that the ice he slipped on was concealed by snow and, thus, was not open and obvious. Plaintiff testified that he could not remember whether there had been snow on the ground at the time of his fall; nor could David Watts remember the pertinent weather conditions. Sarah Tait, plaintiff's girlfriend, however, testified that she "clearly" remembered the existence of snow, and Mark Anderson testified that there was snow "everywhere." Moreover, plaintiff testified that, after he fell, he noticed water dripping from an overhang into the area. Plaintiff also testified that he had informed defendants about the dripping water at certain times in the past and that he had seen ice in the past at the spot where he fell.

The evidence establishes the existence of an open and obvious condition, even when viewed in a light most favorable to the plaintiff. Given the snow on the ground, the dripping overhang, and the history of ice being at the spot in question, we conclude that an average person with ordinary intelligence would have realized that a danger of slipping existed and would have been able to discover the danger and risk of the ice upon casual inspection. See, generally, *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002).

Plaintiff further contends that even if the condition was open and obvious**,** it still was unavoidable and presented an unreasonable risk of harm. As discussed, the danger of the ice was open and obvious and a failure to warn theory cannot establish liability. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). But "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. Specifically, in *Lugo, supra* at 517-519, our Supreme Court provided the following with regard to open and obvious conditions:

> [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. . . . Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. [Citations and footnotes omitted.]

Basically, special aspects are those conditions that create a high risk of harm or severity of harm if not avoided. *Lugo, supra* at 518-519. The *Lugo* Court provided two scenarios to demonstrate when a condition could be considered unavoidable or unreasonably dangerous. *Id*. at 518-519. The *Lugo* Court noted that in the following situation the open and obvious doctrine would not apply because the condition would be essentially unavoidable:

> [A] commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id*. at 518.]

Lugo, supra, next discussed the special aspects of a thirty foot unguarded and unmarked pit in a parking lot as posing an unreasonable risk of severe harm as:

> The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [*Id*.]

Lugo has clearly established a high standard for determining what constitutes a special aspect. Without the existence of "special aspects," an action premised on a typical open and obvious condition will be barred by the open and obvious danger doctrine. *Id*. at 519-520.

Applying the principles established in *Lugo, supra,* we do not find that the alleged danger in the instant case was unavoidable or that it presented a uniquely high likelihood of severe harm or death. Here, plaintiff acknowledged that he could have taken another route to the door of the building instead of traversing the area where he had seen ice in the past. Thus, there was no unavoidable risk like that in *Lugo*, as plaintiff was not forced to traverse the path he did; he could have taken the path he had safely taken earlier. Moreover, and significantly, there was nothing particularly unusual about a layer of ice and a layer of snow existing on the sidewalk such that the danger caused by it was unreasonable.[1] See, generally, *Joyce, supra* at 243; see also *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002). The condition that led to plaintiff's fall simply did not have "special aspects" that made it "unreasonably dangerous." See *Joyce, supra* at 242. The trial court correctly determined that there were no special aspects alleged by the plaintiff making the path unreasonably dangerous. Although his argument is not entirely clear, plaintiff seems to contend that summary disposition was inappropriate because the ice on which he slipped was formed "unnaturally." Plaintiff seems to imply that "unnatural" formations of ice are exempt from the open and obvious doctrine. However, plaintiff has abandoned this argument by failing to cite any case law to support it. See *Palo Group Foster Care, Inc v Michigan Dept of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998).

III

Plaintiff next argues that summary disposition was not proper with regard to his claim because defendants' breached statutory duties imposed by MCL 554.139. Plaintiff did not specifically raise this claim until his motion for reconsideration.

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[1] We note that plaintiff likely would have had an easier time traversing the sidewalk had he not been carrying so many items in his hands. Plaintiff, during his deposition, stated "[I]f I didn't have any bags in my hands, I probably could have seen down." Over his counsel's objection, plaintiff reiterated that "could have" seen the icy patch if he had looked down before his fall, but refused to state he "would have."

With regard to a motion for reconsideration, MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

We review for an abuse of discretion a trial court's ruling on a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). To the extent plaintiff raises a question of law, we will address the issue de novo. See *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Plaintiff moved for reconsideration arguing that defendants' motion should have been denied because plaintiff was owed a statutory duty under MCL 554.139 to keep the premises in reasonable repair. The trial court denied the motion, stating that plaintiff "merely present[s] the same issues as ruled upon previously by this Court either expressly or by reasonable implication."

MCL 554.139 imposes a statutory obligation upon lessors of residential premises. Plaintiff correctly points out that the open and obvious doctrine cannot be used to avoid a specific statutory duty. *Woodbury v Bruckner*, 467 Mich 922, 922; 658 NW2d 482 (2002); *O'Donnell v Garasic*, 259 Mich App 569, 581-582; 676 NW2d 213 (2004); see also *Jones v Enertel, Inc*, 467 Mich 266, 170; 650 NW2d 334 (2002). In *O'Donnell, supra* 518, this Court recently provided:

> The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b).

Based on the recent case law and on the allegations in plaintiff's complaint,[2] it was "palpable error," MCR 2.119(F)(3), for summary disposition to be granted on plaintiff's claim based on the open and obvious doctrine, without taking into account defendant's statutory duties under MCL 554.139. The trial court in its denial of plaintiff's motion for reconsideration provided that the issue was "ruled upon previously by this Court either expressly or by reasonable implication." The trial court did not address "expressly or by reasonable implication" the elements of MCL 554.139 and, if it did, it errantly granted summary disposition in favor of defendants based on an application of the open and obvious danger doctrine. Thus, we find that

[2] Plaintiff, in his complaint, did base his claims on the fact that he was on defendant's premises as a "tenant."

the trial court has abused its discretion in denying plaintiff's motion for reconsideration,[3] or if it has addressed that issue, plaintiff has demonstrated error, and we reverse the trial court's grant of summary disposition and remand to the trial court for further proceedings in accordance with *O'Donnell, supra*; i.e., to determine whether defendants' maintained the premises "in reasonable repair and in compliance with state and local safety laws." Like in *O'Donnell, supra*, factual questions exist in the present case, regarding the applicability of these exceptions to the open and obvious danger doctrine.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jessica R. Cooper

[3] Typically, it is not an abuse of discretion for the trial court to deny a motion for reconsideration where a legal theory or facts could have been argued before entry of the trial court's original order. See *Charbenau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). But we note that in light of the fact that trial court did not base its denial on the fact that plaintiff did not specifically make the claim prior to the trial court's original order and the recentness of the case law supporting defendant's claim; an abuse of discretion exists. The case supporting plaintiff's position was decided December 26, 2002. Plaintiff's complaint was filed April 1, 2002 and brief in opposition to defendant's motion for summary disposition was filed March 13, 2003. Technically, plaintitff could have raised the issue in his brief in opposition to defendants' motion for summary disposition or at the hearing, but, instead, did not raise the issue until his motion for reconsideration.